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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re

Review of the Prime Time Access
Rule, Section 73.658(k) of the
Commission's Rules

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MM Docket No. 94-123

COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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SUMMARY OF COMMENTS OF NBC

The Prime Time Access Rule (PTAR) has created the most concentrated hour of programming in all of television, and has therefore yielded precisely the opposite results from those the FCC intended. Here's what has happened under PTAR:

- Ninety-six percent (96%) of the syndicated programming broadcast by Top 50 market affiliates of NBC, CBS and ABC during the weekday access period is distributed to these stations by only four companies.
- Three of these four companies are major Hollywood studios (Paramount, Fox and Warner Brothers), which have never had a problem gaining access to viewers. Both prior to PTAR and today, these studios are primary suppliers of network prime time programming. All three of these studios now also have their own national broadcast networks.
- The fourth company, King World, which distributes Wheel of Fortune, Jeopardy and two other highly popular access programs, controls more affiliate hours in the access period than any single network controlled before PTAR was adopted.
- In terms of program producers, the access period is one of the least diverse hours on television. Over 85% of the syndicated programs broadcast during access by NBC, CBS and ABC Top 50 market affiliates are produced by Hollywood studios -- the same studios that have always produced programming for the networks. Ironically, today the three networks' prime time schedules contain more source diversity -- with 30 different production sources -- than the access period.
- The two most popular shows in access -- Wheel of Fortune and Jeopardy, which account for over a third of affiliate access period program hours in the Top 50 markets -- are produced by a subsidiary of Columbia, a major Hollywood studio, and were originally launched as network programs. These two programs therefore contribute little or nothing to either source or content diversity.

"Network dominance" and scarcity of program outlets and sources -- the original motivations for the rule -- are simply not rational concerns in the 1990's. The three networks no longer

constitute a "funnel" or "filter" through which all program producers must pass in order to gain access to viewers.

Moreover, the costs of PTAR are high. In order to create "competitive opportunities" for certain segments of the industry, PTAR handicaps the most successful broadcasters and deprives viewers of the programs they would prefer to see. PTAR also distorts and restricts competition in almost every facet of the television marketplace.

Nor are the costs imposed by PTAR mitigated by any offsetting increase in diversity. The rule has not resulted in the creation of more programming outlets, more programming sources or more diverse programming viewpoints. In fact, the only beneficiaries of the rule are the two or three major Hollywood studios who engage in first-run syndication, one powerful syndication company and some major market independent stations. These entities neither need nor are entitled to government protection to ensure their success in the marketplace. These companies will, of course, fight fiercely to retain a rule that gives them so many competitive advantages. But, as the Notice acknowledges, the Commission's regulations must serve the public interest and maximize consumer welfare, not merely protect individual competitors.

In short, there is no justification for retaining PTAR. The

Economic Analysis submitted in conjunction with NBC's Comments presents a compelling empirical and analytical case for total repeal of the rule. At a minimum, the Commission should immediately restore to Top 50 market affiliates the unrestricted right to acquire programs in the marketplace for the fourth hour of prime time, and give all program suppliers the ability to compete to supply that programming. There is no reason why these stations should be denied the freedom to acquire programming in the open marketplace from any competing seller, based on their assessment of which program will best serve their local communities. The government should get out of the business of picking winners and losers in the programming marketplace, and allow stations and viewers to decide which programs succeed and which fail.

Specifically, we urge the Commission to immediately eliminate all restrictions on how affiliated stations in the Top 50 markets can program the fourth hour of prime time, except for the current limit on the number of hours the station can accept from a network pursuant to its affiliation agreement. Interim relaxation of PTAR should not be limited to removal of the off-network restriction, thereby benefiting only a few major Hollywood studios. Rather the rule should be changed so that both off-network programs and first-run syndicated programs produced by a network production entity are able to compete in the marketplace for clearance on Top 50 market affiliates during access. After three years under this modified

PTAR regime, the balance of the rule should automatically sunset unless the Commission makes an affirmative finding the public interest would be significantly harmed by repeal.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY.....	1
II. THE NETWORKS DO NOT "DOMINATE" ANY RELEVANT MARKET...	7
III. PTAR HAS FAILED TO INCREASE OPPORTUNITIES FOR INDEPENDENT PRODUCERS.....	13
A. The Number Of Prime Time Production Sources Has Declined Under PTAR.....	13
B. PTAR Is Not Necessary To Protect "Independent Producers".....	19
C. Elimination of the Fin/Syn Restrictions Does Not Justify Continuation of PTAR.....	23
IV. NETWORKS DO NOT DICTATE AFFILIATE PROGRAMMING CHOICES.....	26
V. INDEPENDENT STATIONS NO LONGER NEED A GOVERNMENT- IMPOSED COMPETITIVE ADVANTAGE.....	31
A. PTAR Is Not Responsible For The Growth Of Independent Stations.....	31
B. Independent Stations Do Not Need The Government-Imposed "Competitive Advantages" Afforded By PTAR.....	32
C. Any Benefit PTAR Has Conferred On Independent Stations Is Outweighed By The Losses It Has Inflicted On Consumer Welfare, Competition and Diversity.....	35
VI. OTHER ISSUES: TRANSITION MEASURES, DEFINITIONS AND EXCEPTIONS.....	40
A. Transition Measures: The Commission Should Immediately Allow Top 50 Affiliates To Broadcast Off-Network and Network-Produced First-Run Syndicated Programs During The Fourth Hour of Prime Time.....	40
B. Definition Of A Network.....	42
C. Exempted Programming.....	44
VII. CONCLUSION.....	47

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COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC") files these Comments in response to the Notice of Proposed Rulemaking ("Notice") released October 25, 1994, which seeks comment on whether there are legal and policy justifications for continuation of the Prime Time Access Rule ("PTAR").

I. INTRODUCTION AND SUMMARY OF POSITION

There are a number of compelling reasons why PTAR should be repealed. First, fundamental and far-reaching marketplace and competitive changes have eliminated any justification for the rule. "Network dominance" and scarcity of program outlets and sources -- the original motivations for the rule -- are simply not rational concerns in the 1990's. The three networks no longer constitute a "funnel" or "filter" through which all program producers must pass in order to gain access to viewers. As the Commission correctly concluded,

both the number of outlets able to purchase television

programs and the number of television programs being shown to the average household or consumer has increased very substantially since 1970...Hence, by almost any measure, it is reasonable to conclude that the level of competition in the sale and purchase of video programs has increased significantly...[and] the overall dominance of the three broadcast television networks in the video marketplace appears to have declined significantly. (Notice, pars. 16, 19-20).

Second, the rule has not achieved its principal goals: the development of diverse sources of programming and increased station programming choice. Instead, PTAR has produced the most concentrated hour of programming in all of television:

- Ninety-six percent (96%) of the syndicated programming broadcast by Top 50 market affiliates of NBC, CBS and ABC during the weekday access period is distributed to these stations by four companies.
- Three of these four companies are major Hollywood studios (Paramount, Fox and Warner Brothers). Both prior to PTAR and today, these studios are primary suppliers of network prime time programming. Each of these studios now also has its own national broadcast network.
- In terms of the production sources for programs shown in access, over 85% of the syndicated programs broadcast by NBC, CBS and ABC Top 50 market affiliates are produced by one of the major Hollywood studios -- the same studios that have always produced programming for NBC, CBS and ABC. Ironically, today the three networks' prime time schedules contain more source diversity -- with 30 different production sources --than the access period.
- The two most popular shows in access -- Wheel of Fortune and Jeopardy, which account for over a third of affiliate access period program hours in the Top 50 markets, are produced by a subsidiary of Columbia, a major Hollywood studio, and were originally launched as network programs. These two programs therefore contribute little or nothing to either source or content diversity.
- King World, which distributes Wheel of Fortune, Jeopardy and two other highly popular access programs, controls

more affiliate hours in the access period than any single network controlled before PTAR was adopted.

Thus, PTAR has produced precisely the opposite results from those the Commission intended.

Third, the costs of the rule are high. In order to create "competitive opportunities" for certain segments of the industry, PTAR handicaps the most successful broadcasters and deprives viewers of the programs they would prefer to see. PTAR also distorts and restricts competition in almost every facet of the television marketplace.

In fact, the only beneficiaries of the rule are the two or three major Hollywood studios who engage in first-run syndication, one powerful syndication company and some major market independent stations. These entities neither need nor are entitled to government protection to ensure their success in the marketplace. These companies will, of course, fight fiercely to retain a rule that gives them so many competitive advantages by stifling competition. But, as the Notice acknowledges, the Commission's regulations must serve the public interest and maximize consumer welfare, not merely protect individual competitors.

The Commission has called upon the parties filing comments in this proceeding "to present a rigorous economic framework for

analysis, supported by adequate data, that will enable us to assess the competitive effects of the rule and its efficacy in achieving both competition and non-competition-based public interest goals." In response to that request, NBC, ABC and CBS commissioned Economists, Inc. to collect and analyze data relevant to the operation and effect of PTAR on the marketplace. The result of that analysis is contained in a report entitled An Economic Analysis of the Prime Time Access Rule ("Economic Analysis"), which has been filed separately in this proceeding.

The Economic Analysis examines the original economic grounds for the Rule and concludes that none is valid today. It describes the efficiencies and consumer welfare that flow from the network/affiliate system and demonstrates that handicapping this system, as PTAR does, leads inevitably to a loss of economic efficiency and consumer welfare. It documents in detail how the rule distorts and restricts competition in a way that adversely affects program producers, syndicators, independent stations and ultimately viewers -- the supposed beneficiaries of PTAR. In addition to cataloguing the costs exacted by PTAR, the Economic Analysis demonstrates that the rule has not led to an offsetting increase in diversity or any other public interest benefit. In sum, it presents a compelling empirical and analytical basis for outright repeal of the rule.

At a minimum, the Commission should immediately restore to Top 50 market affiliates the unrestricted right to acquire programs in the marketplace for the fourth hour of prime time, and give all program suppliers the ability to compete to supply that programming. There is no reason why these stations should be denied the freedom to acquire programming in the open marketplace from any competing seller, based on their assessment of which program will best serve their local communities. The government should get out of the business of picking winners and losers in the programming marketplace, and allow stations and viewers to decide which programs succeed and which fail.

Specifically, we urge the Commission to immediately eliminate all restrictions on how affiliated stations in the Top 50 markets can program the fourth hour of prime time, except for the current limit on the number of hours the station can accept from a network pursuant to its affiliation agreement. Interim relaxation of PTAR should not be limited to removal of the off-network restriction, thereby benefiting only a few major Hollywood studios. Rather the rule should be changed so that both off-network programs and first-run syndicated programs produced by a network production entity are able to compete in the marketplace for clearance on Top 50 market affiliates during access. After three years under this modified PTAR regime, the balance of the rule should automatically sunset unless the Commission makes an affirmative finding the public

interest would be significantly harmed by repeal.

In these comments, NBC will highlight the most significant conclusions of the Economic Analysis, and will utilize those conclusions and the data on which they are based to respond to the specific questions posed in the Notice.

II. THE NETWORKS DO NOT "DOMINATE" ANY RELEVANT MARKET

Almost 25 years ago, PTAR was adopted to curb what was then perceived to be "network dominance" in program production and distribution. The Commission felt that this so-called "network dominance" deprived independent producers of the opportunity to market programs to an adequate base of stations, inhibited the free exercise of affiliate program choice, restricted competition in the program supply marketplace and, ultimately, resulted in less program diversity. Based on this rationale, the Commission concluded that the public interest required "limitation on network control and an increase in the opportunity for the development of independent sources of prime time programming."

The Commission's response was PTAR, which explicitly prohibits Top 50 market affiliates of NBC, ABC and CBS from broadcasting more than three hours of "network programming" in prime time.¹ The Commission hoped that this restriction would reduce "network dominance," increase the output of independent producers, free affiliates to choose programs preferred by their audience and

¹ 47 CFR Sec. 73.658(k). In 1970 the Commission included off-network programming in the definition of "network programming." It was not until 1991 that it explicitly included first-run syndicated programs produced by a network-owned entity in the definition. In the Matter of Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094, 3146 (1991).

strengthen independent stations. If the rule achieved its intended results, the Commission thought, there would be more competition in the program marketplace, as well as increased diversity of outlets, program sources and program content.

Whether or not this approach made any sense 25 years ago, it is clear beyond a doubt that, a quarter of a century later, the marketplace predicates for PTAR have totally disappeared. NBC, CBS and ABC do not "dominate" the program production and distribution market, or any other relevant market. As documented in the Economic Analysis and as the Notice acknowledges, fundamental and far-reaching changes in the television marketplace have occurred since PTAR was adopted, and these changes have significantly diminished the competitive position of the networks and eliminated any vestige of so-called "network dominance." As the Commission stated when it modified the Financial Interest and Syndication Rules, which were adopted in conjunction with PTAR to serve a similar purpose, new viewing options have emerged that represent "not only a source of diversity for viewers, but an additional market opportunity for program producers."² The Commission's judgment is amply supported by unassailable facts:

² In the Matter of Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282, 3304-05 (1993) (hereinafter Fin/Syn Second Report and Order).

First, the number of programming outlets has expanded dramatically in the 25 years since PTAR was adopted:

- There has been an enormous increase in the number of broadcast stations, and particularly in the number of independent stations, which has grown from 62 in 1970 to 438 by 1993. On average there are 5.8 independent stations in each of the Top 50 markets. All but one of the Top 50 markets now has a Fox affiliate and at least one non-Fox independent station. In addition, there are over 1,300 low power TV stations nationwide that are not affiliated with any network. (Economic Analysis, pp. 9-11).
- Cable has also contributed to the exponential growth in the number of video programming outlets. Almost 62% of U.S. television households subscribe to cable, and 97% have access to cable. (Economic Analysis, pp. 7-9).
- Millions of other consumers obtain alternatives to broadcast television through newer distribution technologies, such as SMATV, backyard dishes, MMDS and VCRs. (Economic Analysis, pp. 12-13). According to the Notice, 6% of television households subscribe to these other forms of distribution media (par. 52).
- In 1994, over 84 million U.S. households owned a VCR and spent more than \$14 billion on video rentals. (Economic Analysis, pp. 26-27). The home video market provides both competition to broadcast and cable programmers for viewers' time and an additional market for program producers.

This dramatic growth in the number of video outlets has significantly increased viewer program choice. In 1970, the average home could receive only 7 channels of programming, all of them consisting of over-the-broadcast signals. Today the average home receives over 30 channels of programming, including 13 or more over-the-air channels. (Economic Analysis, p. 59). Thus, all viewers -- even the dwindling number who still do not subscribe to

one or more of the growing forms of pay media -- have substantially more video outlets to choose from than in 1970.

The phenomenal growth in the number of video outlets has created an insatiable demand for programming, and the number of programmers supplying video product to these outlets has mushroomed as well:

- There are now four full-fledged broadcast networks -- NBC, ABC, CBS and FOX. Two new networks -- United Paramount Network and WB Television -- launched early this year. (Economic Analysis, pp. 13-16).
- There are nearly 150 national and regional cable networks. Most of these networks rely on original programming not previously shown on NBC, CBS or ABC. Attached to these Comments is a list of original cable programming which was published in the February 20, 1995 issue of Broadcasting & Cable magazine. It reveals a stunning amount and array of original program fare on cable, which provides both new opportunities for producers and new choices for viewers. According to the Economic Analysis, cable spent nearly \$3 Billion on entertainment programming in 1994, only about 16% less than the aggregate entertainment expenditures of the three original networks. (Economic Analysis, App. G).
- The first-run syndication market has also grown substantially in size and in the popularity and success of the programming offered. In 1994, there were 259 different programs in syndication, 75% of which were first-run. (Economic Analysis, pp. 17-18).

Competition from these many outlets and programming sources has steadily eroded the marketplace position of the networks, both individually and collectively.

- Each network's average share of the prime time audience

has declined from 31.1 during the 1971/72 season to 20.2 during the 1993/94 season, a loss of almost one-third of each network's audience (Economic Analysis, pp. 19-20);

- In 1970, each network's share of national advertising revenue was 19.1%. By 1993, the average for ABC, CBS and NBC was only 14.6% (Economic Analysis, pp. 20-21);
- Most significant in terms of the goals of PTAR, there is no longer a "three network funnel" through which programming has to pass to reach the audience. In 1994, the three networks combined accounted for only 30.5% of total first-run entertainment programs appearing on broadcast and cable television, and each network accounted for only approximately 9.4% of the aggregate expenditures on video entertainment programming in the U.S. (Economic Analysis, pp. 25-27; App. F).

As the Commission acknowledges in the Notice, competition to the networks from other delivery systems will only increase in the future as cable, MMDS, SMATV and DBS subscriptions grow, and as new distributors, such as video dial tone providers, penetrate the market. (Notice, par. 21).

In sum, the market conditions that prompted the Commission to adopt PTAR no longer obtain -- they are as much a part of ancient history as black and white television and kinescopes. The networks do not "dominate" program production and distribution today, even assuming they ever did. As the Commission's Office of Plans and Policy recently concluded in a comprehensive study of the broadcast industry, "the power of the networks that the Commission has historically sought to curb has succumbed to technology and

competition."³

We fail to see why a rule designed to remedy a specific market condition which admittedly no longer exists should be perpetuated, even if it once made sense, and even if it has achieved its stated goals (which, as we will demonstrate, it has not). The Commission nonetheless seeks comment on the continued need for PTAR in the video marketplace of the mid-1990's and beyond. Using the specific analytical framework for evaluating PTAR which is set out in the Notice, we will turn to the specific questions the Commission has raised.

³

Broadcast Television in a Multichannel Marketplace, OPP Working Paper Series, June 1991, p. 169.

III. PTAR HAS FAILED TO INCREASE OPPORTUNITIES
FOR INDEPENDENT PRODUCERS

A. The Number of Prime Time Production
Sources Has Declined Under PTAR

The Notice asks whether PTAR has increased the number of independent producers or independently produced programs. To answer this question, it is first necessary to define what is meant by "independent producer." To measure and evaluate the impact of PTAR on the programming marketplace, a critical distinction must be drawn between those entities that engage in the creative process of producing programs ("producers"), and those entities that are in the business of distributing programs produced by others ("distributors"). Historically and today, NBC, ABC and CBS have principally performed the latter function. When PTAR was adopted in 1970, for example, NBC, CBS and ABC on average produced only 1.2% of their prime time entertainment series in-house. (Economic Analysis, Table A-11, p. 73). The balance of their schedules was acquired from major Hollywood studios and producers not affiliated with a major studio.⁴ Even today, the networks acquire over 75%

⁴ When the Notice states that the three networks "directly controlled" 96.7% of prime time programs in 1968 (Notice, par. 13), the Commission is referring not to in-house productions, which comprised a tiny percentage of the networks' schedule, but to every program that was produced by the 50-odd suppliers of network prime time programming that was licensed for exhibition by a network. Apparently, only advertiser-supplied programs were deemed beyond the networks' "direct control." But

the entertainment programs they distribute to affiliates from outside producers. (Economic Analysis, Table E-25, p. 106).

In adopting PTAR, the Commission blurred the critical distinction between the producer of a program and the distributor of a program by equating the two functions.⁵ It then proceeded on the assumption that by increasing opportunities for program distributors in prime time, the rule would also stimulate greater opportunities for program producers. An analysis of what has happened to the programming marketplace under PTAR proves that this assumption was wrong, and the Commission's goal was not achieved.

Obviously, if a government rule excludes three program distributors such as NBC, CBS and ABC from an hour of prime time,

as the Commission itself admits, "in today's marketplace, many producers are regarded as 'independent' despite the fact that they sell programming to the major networks." (Notice, n. 76).

⁵ The Commission's definition of "independent producer" in the PTAR context is thus totally different from the definition the Commission now uses in the context of the Financial Interest and Syndication Rules. For purposes of fin/syn, an "independent producer" is a program producer, not a program distributor, that is neither a network nor a major Hollywood studio. To determine whether program is produced by an "independent producer" the Commission focused "on the legal owner of the program," saying this was "consistent with its historic approach to diversity..." Fin/Syn Second Report and Order, 8 FCC Rcd at n. 66.

one or more different distributors will fill the void. But this does not mean that true source diversity has been enhanced. In fact, PTAR has prevented local stations from choosing programming from a greater diversity of production sources that are available in the marketplace, has resulted in fewer different producers of prime time programming, and has therefore resulted in less program source diversity. This result is unsurprising given the fundamental economics of television production and distribution. Whether a show is distributed to stations by a network or another national program distributor, it must clear a relatively large number of stations to be economically viable. Therefore, it is inevitable that only very few programs -- and therefore very few production sources or distributors -- will be profitable in the access period.

Even if measuring the number of program distributors was the proper test, PTAR has at best made a marginal contribution to diversity. According to Appendix H of the Economic Analysis, only four non-network program distributors account for 96% of all the non-news programming acquired by top 50 market affiliates for the weekday access period. Three of the four, accounting for almost half of the programming furnished to Top 50 affiliated stations during weekday access, are Fox, Paramount and Warner Brothers. These are major Hollywood studios, who have always been able to

place their programs on the three original networks,⁶ who now all operate their own viable broadcast networks, and who certainly don't need the government to protect them from ABC, CBS and NBC.

Only one major access program distributor -- King World -- is a new entity to the marketplace since the adoption of PTAR. However, King World controls 47% of the syndicated programming hours acquired by Top 50 affiliates for access, and 36% of all Top 50 affiliate access programming hours -- more hours in the access period than any single network controlled before PTAR was adopted.⁷ In fact, King World controls 31.4% of the first-run syndication market nationwide and 21% of the entire syndication market.⁸ It hardly serves the public interest to maintain anti-competitive regulations just to benefit this one corporate behemoth.

The example cited by the Notice itself highlights our point. In the course of discussing the apparent success of PTAR in

⁶ These three studios accounted for 17.5% of the entertainment series programs supplied to the three networks during the 1969-70 season immediately prior to the adoption of PTAR. They accounted for 21.7% during the most recent 1993-94 season. (Economic Analysis, App. E).

⁷ Assuming the three networks programmed the entire fourth hour of prime time, each supplied only 33 1/3% of total affiliate programming time during that hour.

⁸ Paul Kagan Associates, TV Program Stats, September 30, 1994, p. 5 and October 31, 1994, p. 4.

increasing the demand for and production of "independently produced" programs, the Notice states: "...since PTAR was established, successful, independently produced programs like Wheel of Fortune have been added to the mix of programs available to the public..." (Notice, par. 34). The more one knows about Wheel of Fortune -- one of the most successful first-run syndicated shows -- the more the Commission's enthusiasm for the program's contribution to source diversity appears misplaced. Wheel of Fortune was originally a network program, which subsequently went into first-run syndication⁹. Thus, contrary to the Commission's assertion, it was not first made available to the public because of PTAR. Moreover, the program is produced by a subsidiary of Columbia Pictures Television, a major studio supplier to networks, not an "independent" production entity as the Commission uses that term in other contexts. Just as when it produces a show for one of the three networks, Columbia does not distribute the show directly to stations. It does so through King World, a major syndication company which, as we have noted above, dominates the first-run segment of that market. It is hard to see why Wheel of Fortune (a syndicated program produced by Columbia and distributed to stations by King World) contributes to source diversity, but Sweet Justice (a network program produced by Columbia and distributed to stations

⁹ The same is true for Jeopardy, another highly successful access program distributed by King World. (Economic Analysis, p. 61).

by NBC), does not. In truth, there is no difference.

In short, even though PTAR made it possible for three major studios and King World to distribute programs directly to Top 50 affiliates in prime time without competition from any of the networks, PTAR has not contributed much to diversity.

Looking beyond the question of who distributes the programs shown in access to the more appropriate question whether PTAR has increased the number of different producers whose programs are exhibited in access, it is clear that the rule has been a dismal failure. During the access hour on Top 50 affiliates there is actually less diversity than in the prime time schedules provided the networks: 85.3% of the programs acquired for access by these stations were produced by an MPAA studio.¹⁰ In contrast, for the 1993-94 season, MPAA studios represented 49% of the total entertainment series programs offered by the three networks. (Economic Analysis, App. E).

Moreover, as the Commission concluded in the fin/syn proceeding, the absolute number of program producers has declined

¹⁰ Wheel of Fortune and Jeopardy are produced by a subsidiary of Columbia Pictures Television and represent 34.9% of the total. Programs produced by Fox, Warner Brothers and Paramount, along with Columbia's Married...With Children account for another 50.4%.

under the PTAR-fin/syn regulatory regime.¹¹ According to Appendix E of the Economic Analysis, there were 55 producers supplying prime time entertainment series to the three networks during the 1969-70 season, when there were 28 hours of network prime time programming. By the 1993-94 season, when network prime time programming comprised 22 hours of the total, the number of such producers had shrunk to 30. The 6 weekly hours of access time on Top 50 affiliates carved out by PTAR -- the time that was supposed to stimulate the entry of new "independent" producers -- did not compensate for the decline in network production sources. In 1994, only four of the producers of access programming broadcast by Top 50 affiliates was not a network program supplier in 1969.¹² One was King World. The other three accounted for only 5 out of 119 hours of syndicated programming, or 4% of the total. Thus, under PTAR, there has been a net loss of 21 prime time program suppliers -- or 38% of the 1969 total.

B. PTAR Is Not Necessary To Protect "Independent Producers"

There is no reason to perpetuate a rule that provides competitive advantages only to a few major Hollywood studios and King World. More important, as discussed in Section II of these

¹¹ Fin/Syn Second Report and Order, 8 FCC Rcd at 3310-3311.

¹² The new distributors are King World, Genesis, All American and MTM/IFE.